Nos. 77-405 and 77-417

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE H. LUSTIG, PETITIONER

v.

UNITED STATES OF AMERICA

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals in No. 77-405 (Pet. App. 36-83) is reported at 555 F. 2d 737. The opinion of the court of appeals in No. 77-417 (Pet. App. 21-25) is reported at 555 F. 2d 751.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 1977, and petitions for rehearing were denied on August 12, 1977. The petition for a writ of certiorari in No. 77–405 was filed on September 14, 1977. The petition in No. 77–417, a civil case, was filed on September 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

NO. 77–405

1. Whether the district court violated petitioner's marital privilege by admitting the testimony of a woman whom petitioner contended was his common-law wife.

2. Whether the district court committed reversible error in instructing the jury that, once a conspiracy is shown to have existed, "slight evidence" is sufficient to show that a particular defendant was a participant in the conspiracy.

3. Whether petitioner, who retained counsel only four days before trial, was entitled to a continuance to allow counsel additional time to prepare for trial.

4. Whether evidence discovered during an inventory search of petitioner's vehicle should have been suppressed.

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[1] Rule 22(2) provides that in cases tried in Alaska the petition shall be deemed timely if *mailed* within 30 days of the judgment of the court of appeals. The petition in No. 77–405 was mailed on September 12, a Monday, and therefore is timely.

5. Whether the limitation on the questioning of two witnesses violated the Confrontation Clause of the Sixth Amendment.

6. Whether the district court should have polled the jurors on every count on which petitioner was found guilty.

7. Whether the district court properly excused a juror who said he possessed information that led him to believe petitioner was guilty.

NO. 77–417

8. Whether the district court had the authority to order the sentence on which petitioner's probation had been revoked to run consecutively to the sentence for his intervening conviction.

9. Whether petitioner could defend a probation revocation proceeding by arguing that the guilty plea on which his probation was based was invalid or by challenging the manner in which he was being credited with time spent in prison.

10. Whether a conviction for an offense committed while on probation is a sufficient reason to revoke probation.

STATEMENT

NO. 77–405

Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of conspiracy to distribute cocaine, possession of 55 grams and 317 milligrams of cocaine, and distribution of 25 grams of cocaine, in violation of 21

U.S.C. 841(a)(1) and 846. He was sentenced to three concurrent terms of nine years' imprisonment and to a concurrent term of one year's imprisonment on one of the possession counts. These sentences are to be followed by concurrent terms of three years' special parole.[3] The court of appeals affirmed.

1. On February 27, 1976, undercover officer Bernard Lau, posing as a drug dealer from Seattle, was introduced to Gregory Pederson in Anchorage, Alaska, by Mike Tarnef, an informant (Tr. 251, 1567). After making a telephone call,[4] Pederson agreed to sell Lau one ounce of cocaine for $1,850 (Tr. 268–270, 303).

The transaction took place in front of the Royal Inn in Anchorage, Alaska. Lau drove there at Pederson's direction to meet Pederson's source, whom Pederson identified as "George Lustig" (Tr. 254, 305, 1534–1535, 1545, 1547, 1801–1802). Lau and Pederson met with petitioner.[5] Pederson obtained a package

[3] Gregory D. Pederson and Cheryl Rae Smith (also known as Sherri L. Pederson) were tried with petitioner. Pederson was convicted on two counts of distribution of cocaine and one count of conspiracy to distribute cocaine. He was sentenced to concurrent terms of seven years' imprisonment. Smith was convicted of distribution of cocaine and of conspiracy to distribute cocaine; she was sentenced to two years' imprisonment. The court of appeals affirmed Pederson's conviction. His petition for a writ of certiorari (No. 77-5118) was denied on October 31, 1977. Smith's appeal is pending in the court of appeals (No. 76-2725).

[4] Telephone toll records established that approximately 15 calls were made from Pederson's residence to petitioner's phone between January 18 and March 3, 1976 (Tr. 1197–1199).

[5] Lau (Tr. 646–649), two other officers (Tr. 646–649, 1046–1047), and Tarnef (Tr. 1571–1572) positively identified petitioner as the third person present at this meeting.

from petitioner and gave it to Lau; the package contained cocaine (Tr. 275, 309–310). Pederson told Lau that his source could supply heroin as well as cocaine (Tr. 303, 313, 1594).

On March 4, 1976, Officer Lau arranged to purchase another package of cocaine from Pederson and his wife, Cheryl Smith. Lau gave Pederson and Smith the full purchase price of $2,750, in addition to $300 that Pederson said he owed his "main man" (Tr. 317–319). While under aerial surveillance by law enforcement agents, Pederson and Smith drove to a spot near petitioner's house, where they were met by another car. The second car returned to petitioner's residence. Pederson and Smith returned to Anchorage, where they delivered the cocaine to Officer Lau (Tr. 349–350, 1243–1274, 1287–1290, 1906, 1908).

Both deliveries of cocaine were packaged in "seal-a-meal" bags, a unique means of handling cocaine (Tr. 278, 291, 1043–1044). Petitioner was arrested on March 11, 1977, in a truck that contained a "seal-a-meal" machine, a set of scales, a "seal-a-meal" bag containing 55 grams of 50 percent cocaine, an unused "seal-a-meal" bag, and a vial of 317 milligrams of pure cocaine (Tr. 767–769, 777–781, 974–977).

Petitioner admitted possessing the cocaine discovered at the time of his arrest but claimed that the drug was for his personal use (Tr. 1604, 1610). But Callie Newton, who had lived with petitioner for many years, testified that on numerous occasions petitioner had sold substantial quantities of cocaine to

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several people—including Pederson—and that he once told Pederson that he wished to sell to only a few people in order to guard against detection (Tr. 1951, 1954–1955). Newton saw petitioner use a scale and sealing machine in providing cocaine to Pederson; Newton also testified that Pederson and petitioner had a verbal agreement to distribute cocaine (Tr. 1951–1952, 1955).

NO. 77–417

On May 3, 1974, petitioner pleaded guilty in the United States District Court for the District of Alaska to smuggling marijuana, in violation of 18 U.S.C. 545. He was fined $10,000 and sentenced to five years' imprisonment. The prison term was suspended, and petitioner was placed on probation. On September 10, 1976, the district court revoked petitioner's probation on the basis of his intervening convictions in the cocaine case and his admission at that trial that he possessed cocaine. It ordered petitioner to serve the five years' imprisonment imposed on the revocation consecutively to the nine years' imprisonment he had received for the cocaine violations. The court of appeals affirmed.

ARGUMENT

NO. 77–405

1. Petitioner contends that the district court erred in admitting the testimony of Callie Newton, with whom he had lived for seven years. The argument that Newton's testimony violated the interspousal privilege was thoroughly considered and properly re-

jected by the court of appeals (Pet. No. 77–405 App. 68–73). We rely on its opinion. Newton and petitioner were not at the time of trial (and never had been) validly married under Alaska law, they were no longer living together, and Newton's testimony revealed neither marital confidences nor spousal communications. She testified only concerning her observations of petitioner's engaging in drug transactions with third parties.

2. Petitioner argues that the district court erred in instructing the jury that, once a conspiracy is shown to have existed, "slight evidence" is sufficient to show that a particular defendant participated in it. We agree with petitioner that the instruction was erroneous.[5] But the same claim was raised by Pederson, and this Court denied his petition for a writ of certiorari on October 31, 1977 (No. 77–5118). There is no greater reason to grant review here than in Pederson's case.[6]

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[5] The Fifth Circuit has held that the charge should not be given to the jury because it may lead the jury to convict even though it has a reasonable doubt. See, *e.g.*, *United States* v. *Partin*, 552 F. 2d 621 (C.A. 5), certiorari denied, October 17, 1977 (No. 77–34); *United States* v. *Hall*, 525 F. 2d 1254, 1256 (C.A. 5). The "slight evidence" test should be used only as an aid in judicial evaluation of the sufficiency of the evidence under the standard of *Glasser* v. *United States*, 315 U.S. 60, 80. See, *e.g.*, *United States* v. *Addonizio*, 449 F. 2d 100, 102 (C.A. 3), certiorari denied *sub nom. Gordon* v. *United States*, 404 U.S. 1058; *Langel* v. *United States*, 451 F. 2d 957, 961–962 (C.A. 8); *United States* v. *Marrapese*, 486 F. 2d 918 (C.A. 2), certiorari denied, 415 U.S. 994.

[6] We are providing petitioner with a copy of our brief in opposition in No. 77–5118. Because petitioner's nine-year term of im-

3. Petitioner obtained new counsel four days prior to his scheduled trial date, although the district court had urged petitioner a month earlier to complete any

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prisonment on his conspiracy conviction runs concurrently with nine-year terms of imprisonment on two of the substantive counts, this Court need not consider petitioner's challenge to the conspiracy instruction. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. Petitioner's assertion (Pet. 16 n. 20) that the error in the charge on conspiracy "permeated all of the verdicts" is unsupported. The district court unequivocally instructed the jury that each offense charged should be considered separately (R. 549), and at trial petitioner expressly admitted possessing the cocaine found when he was arrested (Tr. 1604, 1610).

Moreover, the error in the instructions was harmless. The evidence of petitioner's guilt for distributing 25 grams of cocaine to Pederson on February 27, 1976 (Count I), and his possession of 55 grams of cocaine on March 10, 1976, when he was arrested, is clear. Petitioner admitted possessing the cocaine discovered at the time of his arrest (Tr. 1604, 1610). There is compelling evidence that petitioner distributed cocaine to Lau and Pederson on February 27, 1976. Four witnesses identified petitioner as the person who delivered the package of drugs to Lau (Tr. 269–273, 646–649, 1571–1572, 1046–1047). Finally, the evidence that petitioner was engaged in a conspiracy was overwhelming. The drugs distributed by Pederson were packaged in an unusual manner by a "seal-a-meal" machine; one such machine was recovered from petitioner at the time of his arrest. Pederson and petitioner were in frequent telephone contact. Callie Newton testified that she had seen Pederson purchase cocaine from petitioner on several other occasions. Although the erroneous "slight evidence" charge would be damaging if the evidence linking a defendant to a conspiracy was arguably tenuous, in this case Pederson's and petitioner's relationship with each other was the conspiracy. Accordingly, it is inconceivable that the jury could have found that a conspiracy existed but that petitioner's connection to it was only "slight"; the instruction therefore could have had no effect on the jury's deliberations.

arrangements with an attorney in time to ensure proper representation. After obtaining new counsel petitioner moved for a continuance, and the district court denied this motion. The court of appeals fully answers petitioner's argument that the denial of a continuance was an abuse of discretion (Pet. No. 77–405 App. 57–61).

4. On March 11, 1976, petitioner was arrested near his home while driving a pick-up truck. One officer gave petitioner *Miranda* warnings; another returned to the truck "[t]o secure the items of value and to conduct an inventory for the items prior to the vehicle being impounded" (Tr. 765), in accordance with standard procedure (Tr. 825). He discovered a brown paper bag lodged between the cab seat and the passenger door (Tr. 827) in such a way that, when the door was opened, it looked as if the items were "going to fall out" (Tr. 830). The bag, which the trooper seized and immediately opened, contained a "seal-a-meal" bagging machine, later identified as the one used for packaging the cocaine sold to Lau, an unused "seal-a-meal" bag, and drug weighing scales (Tr. 766–769, 827). These items were introduced at trial.

Petitioner moved at trial to suppress the items found in the truck because the state officers had arrested him on a federal warrant. He contended that this violated Fed. R. Crim. P. 4 and 9. The district court rejected this argument. On appeal petitioner urged different grounds for suppression; he

contended that the bag had been opened without probable cause and that, although the bag had been opened at the scene of the arrest, it could not be reopened at the police station without a warrant.

Because petitioner did not make these arguments in the district court, he is precluded by Fed. R. Crim. P. 12(f) from making them now as reasons to overturn a decision against him.[7] See *United States* v. *Hicks,* 524 F. 2d 1001 (C.A. 5), certiorari denied, 424 U.S. 946; *United States* v. *Braunig,* 553 F. 2d 777, 780 (C.A. 2), certiorari denied, 431 U.S. 959 ("where a party has shifted his position on appeal and advances arguments available but not pressed below * * * waiver [under Rule 12(f)] will bar raising the issue on appeal"); *United States* v. *Fuentes,* 563 F. 2d 527, 531–533 (C.A. 2).

In any event, the search was proper under *South Dakota* v. *Opperman,* 428 U.S. 364. Alaska law authorized a routine inventory of the truck (see Pet. No. 77–405 App. 67). Petitioner seeks to distinguish *Opperman* on the ground that in the present case the bag found in the truck was reopened at the stationhouse, but the distinction will not serve; in *Opperman* itself the car was impounded near the stationhouse before being searched for inventory purposes. What is more, petitioner's privacy interest in the bag—

[7] See also Fed R. Evid. 103(a)(1), which requires an objection stating the specific ground for the exclusion of evidence. If a party asserts an improper reason, a ruling admitting evidence will not be disturbed even though an objection on another ground might have led to exclusion.

diminished considerably by its presence in the truck—was overcome by the legitimate inventory search to which it was subjected, and the second opening of the bag was not a further invasion of privacy but simply the completion of the inventory that had already begun.[8]

Petitioner's reliance on *United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977, is unwarranted. The Court reaffirmed the propriety of inventory searches (slip op. 8 n. 5), pointing out that the warrant requirement is singularly inapplicable to such searches, which usually are not based on probable cause. Moreover, the search here would have been proper under settled Ninth Circuit law without regard to the inventory search justification (see, *e.g., United States* v. *Mehciz,* 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974), and any change in the law worked by *Chadwick* should not be applied to searches

[8] Petitioner contends in a supplemental memorandum that the inventory search was unauthorized by Alaska law. The state case on which petitioner relies (*Zehrung* v. *State*, 569 P. 2d 189 (Sup. Ct. Alaska)) holds, however, only that an inventory search may not be conducted "if the arrestee is not to be incarcerated" (569 P. 2d at 193). Petitioner was subjected to a full custodial arrest, however, and the inventory search therefore was authorized by Alaska law. (Petitioner's further contention (Pet. 22 n. 28) that an inventory was impermissible because petitioner's friends would have accepted custody of the truck was apparently rejected by the court of appeals and in any event states only an issue of Alaska law not requiring resolution by this Court. Moreover, we doubt that release of the truck to petitioner's friends would have been permissible, because it was subject to forfeiture. See generally *Cooper* v. *California*, 386 U.S. 58.)

conducted before that case was decided. *United States* v. *Peltier*, 422 U.S. 531.[9]

5. Petitioner argues that his right to confront his accusers was infringed by the district court's limitations on the cross-examination of Tarnef and Newton. We rely on the court of appeals' answer to this contention (Pet. No. 77–405 App. 73–78).[10]

6. Petitioner contends that the district court should have polled the jury on each count on which he was found guilty. But the court asked each juror whether the entire verdict was a true verdict, and each answered affirmatively. No more was required; the conduct of a more elaborate poll is committed to the court's discretion. See Fed. R. Crim. P. 31(d).

Petitioner's counsel filed an affidavit (R. 625) stating that a juror had told a friend (and been overheard by someone who told counsel) that the verdict

[9] Two courts of appeals have held that the principles of *Chadwick* should not be applied retroactively. See *United States* v. *Reda*, 563 F. 2d 510 (C.A. 2); *United States* v. *Montgomery*, 558 F. 2d 311 (C.A. 5), certiorari denied, October 31, 1977 (No. 77–5205).

[10] *Davis* v. *Alaska*, 415 U.S. 308, on which petitioner relies, does not support him. *Davis* involved the right of the defendant to cross-examine a critical witness on the questions whether he was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the crime that defendant was charged with committing. Here, by contrast, petitioner was allowed substantial latitude to inquire into bias, and the district court cut off the questioning only when it became a repetitious inquiry into matters that were clearly collateral. Moreoever, the court allowed counsel to bring out that Newton had a civil suit pending against petitioner (Tr. 1988) and cut off questioning only when counsel sought to examine the minute details of that suit (Tr. 1988–1989).

was not unanimous (Pet. No. 77–405 App. 67). But the affidavit does not identify either the juror in question or the person who overheard this conversation, and the record of petitioner's trial shows that each juror endorsed the verdict in open court. Petitioner therefore has established no reason to depart from the principle that where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict. *Stein* v. *New York*, 346 U.S. 156, 178; *Hyde* v. *United States*, 225 U.S. 347, 382–384; *United States* v. *Stacey*, 475 F.2d 1119, 1121 (C.A. 9).

7. Petitioner argues that the district court denied him the right to be present at all critical stages of the proceedings against him when, on the second day of trial and without the presence of counsel, the court examined in its chambers a juror who had stated he possessed information that made him believe that petitioner and his co-defendants were guilty. The court promptly excused the juror from further duty. As the court of appeals correctly held (Pet. No. 77–405 App. 62–65), the court's action conformed to procedures sanctioned by other courts of appeals and, because the juror was excused, could not possibly have prejudiced petitioner.

NO. 77–417

8. Petitioner argues that he was twice punished for the same crime because the district court, on revoking the probation petitioner was serving for his mari-

juana conviction, ordered him to serve the reimposed sentence consecutively to the sentence for the cocaine convictions. But *Zerbst* v. *Kidwell*, 304 U.S. 359, holds that consecutive service is permissible; service of the sentence for an intervening offense committed by a parolee tolls the running of the remainder of the earlier sentence from which the parole has been granted. See also *Moody* v. *Daggett*, 429 U.S. 78, 85. There is no reason to apply a different rule to probation. See *United States* v. *Tacoma*, 199 F. 2d 482 (C.A. 2); cf. *United States* v. *Bartholdi*, 453 F. 2d 1225, 1226 (C.A. 9). The revocation simply reinstates the original sentence for the marijuana conviction; it is not an additional penalty for the cocaine convictions.

9. Petitioner urges that he is entitled to credit against his five-year sentence for time spent awaiting his probation revocation hearing (Pet. No. 77–417, pp. 11–13) and that the 1974 guilty plea, on which his probation was based, was invalid (*id.* at 16–17). Petitioner did not argue in the court of appeals that 18 U.S.C. 3568 was being violated because he was not being credited with time spent in prison, and he may not raise the question here for the first time. In any event, a probation revocation proceeding is not the proper forum for either argument. Petitioner's contention that he is not receiving credit for time spent in jail should be brought in a *habeas corpus* proceeding under 28 U.S.C. 2241, and his contention that his guilty plea is invalid should be made in an applica-

tion to vacate his conviction under 28 U.S.C. 2255. A probation revocation hearing does not offer an opportunity to attack the underlying judgment. *United States* v. *Francischine*, 512 F. 2d 827 (C.A. 5).

10. Petitioner finally argues that his probation could not be revoked solely on the basis of his cocaine convictions. The rule is settled to the contrary. An intervening conviction affords sufficient proof for revocation. See, *e.g.*, *United States* v. *Miller*, 514 F. 2d 41 (C.A. 9). Cf. *Moody* v. *Daggett*, *supra*; *Gagnon* v. *Scarpelli*, 411 U.S. 778. Moreover, as the court of appeals observed (Pet. No. 77–417 App. 24), petitioner admitted at the cocaine trial that he possessed the cocaine found on him at the time of his arrest; this admission was introduced at the probation revocation hearing and afforded an independent basis for revoking his probation.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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